Supreme Court, U.S.
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No. 96-337

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LINDA AUSTIN,
Petitioner,

v.

OWENS-BROCKWAY GLASS CONTAINER, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF

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1. Since the *certiorari* petition was filed, the conflict in the circuits over the vitality—and the scope—of the *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974) rule, outlined at Pet. 17-20, has deepened.

The Eighth Circuit, in *Varner v. National Super Markets, Inc.*, 94 F.3d 1209 (8th Cir. 1996), held that a Title VII plaintiff need not exhaust grievance and arbitration remedies under the collective bargaining agreement:

> [T]he United States Supreme Court has held that the pursuit of a claim through grievance and binding arbitration under a CBA does not preclude a

> civil suit under Title VII, *see Alexander* . . . and we believe the same reasoning applies to a plaintiff who has chosen not to participate in the grievance procedure. . . . We interpret [*Alexander*] . . . to entail an absolute right to adjudicate suits under Title VII as long as the jurisdictional prerequisites are satisfied. These prerequisites do not entail an exhaustion of grievance procedures under a CBA. *See*, 42 U.S.C. § 2000e-5(b), (e) and (f). [94 F. 3d at 1213.]

Like *Varner*, this case involves a sex discrimination claim under Title VII. And, both *Varner* and this case concern the question whether a plaintiff in such a case can be required to exhaust collective bargaining agreement grievance-arbitration procedures, not whether a plaintiff who has done so is bound by the result obtained in arbitration.

Thus, this case and *Varner* are indistinguishable on the various grounds on which respondent attempts to distinguish the other circuit and state high court cases conceptually in conflict with the Fourth Circuit's decision in this case. Respondent's Brief in Opposition to Petition for Writ of Certiorari (Br. Opp.) , at 11-13.

We do not for a moment agree with respondent's distinctions of those other cases. But, for present purposes the salient point is that none of those distinctions apply to *Varner*. Thus, there is now, even on respondent's analysis, no basis at all for delaying plenary review in this Court of the important question raised in the *certiorari* petition.

2. In addition to denying the existence of a circuit conflict, Owens-Brockway's primary response to the *certiorari* petition is to seek to minimize the Fourth Circuit's holding in this case by suggesting that under that holding Ms. Austin would have been entirely free to bring her Title VII and Americans With Disabilities Act case in court had she only first filed a grievance under the collec-

tive bargaining agreement. That is not what the Fourth Circuit held. And if it were, that holding would, as *Varner* indicates, create a second square circuit conflict in addition to the one we noted in the petition, concerning whether the *Alexander v. Gardner-Denver Corp.*, rule applies in the exhaustion, as well as the preclusion, context.

(i) Nothing in the Fourth Circuit's opinion in this case draws the distinction between initial exhaustion of arbitral remedies and later, post-arbitration preclusion of judicial remedies on which the opposition brief rests. Rather, both the Fourth Circuit's own language and the two lines of cases on which the court of appeals relied make clear that any requirement of exhaustion of the arbitral forum necessarily means that the employee would be bound by the grievance/arbitration results, absent proof of narrowly-defined extenuating circumstances justifying vacation of the arbitration award.

Like most such provisions, the grievance/arbitration procedure in the applicable collective bargaining agreement does not contemplate free post-arbitration access to the courts to relitigate the same issues required to be presented to the arbitrator. Rather, that clause provides that the arbitrator's decision "shall be final and binding". Pet. App. 7a. The court of appeals held the arbitration clause, including its "final and binding" provision, equally applicable to statutory, and to contract-based, causes of action. As that court recognized, the effect of doing so is to "*effectively oust*[] a court of jurisdiction" over the individual employee-protective statutory cause of action (Pet. App. 3a n.1, emphasis supplied), and to require that the plaintiff submit to resolution of his or her substantive statutory rights " 'in an arbitral *rather than* a judicial forum,' " (Pet. App. 8a, emphasis supplied, *quoting Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

And, *Gilmer*, the linchpin of the Fourth Circuit's decision, held squarely that enforcing a promise to arbitrate

works a "waiver of a judicial forum" (500 U.S. at 26), not simply a temporary delay of judicial resolution. Thus *Gilmer* held, and the court below understood it to hold, that where arbitration is compulsory, an employee is precluded from litigating her case in court *after*, as well as before, the issuance of the arbitration award.

Cases such as *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), as well as *Gilmer* itself, hold that where an individual agrees to submit a statutory claim to arbitration, and no exception to the coverage of the Federal Arbitration Act (FAA) applies, the FAA as a whole governs, and the dispute is therefore arbitrable. And, the FAA does not simply provide for initial exhaustion of arbitrable remedies; it provides thereafter, and inseparably, for enforcement of any resulting arbitration order, absent proof in court of the narrow grounds on which an arbitration award can be vacated—*viz.*, arbitrator corruption or partiality, procedural misconduct by the arbitrator, or "[w]here the arbitrators exceed their powers." 9 U.S.C. § 10 (a), (b) (c) & (d).

Similarly, the *Steelworkers Trilogy*, "establish[ing] that arbitration is favored in labor disputes" (Pet. App. 6a), makes clear that the policy favoring arbitration of labor disputes, where applicable, encompasses not simply an exhaustion requirement but an extremely narrow role for judicial review once the arbitration award has issued. Thus, on questions concerning the interpretation of collective bargaining agreements,

> the Court made clear almost 30 years ago that the courts play only a limited role when asked to review the decision of an arbitrator. The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract. "The refusal of courts to review the

> merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. . . ." [*Paperworkers v. Misco*, 484 U.S. 29, 36 ((1987), *quoting Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960)).]

If, in fact, petitioner is required to arbitrate both her Title VII and Americans with Disabilities Act causes of action, then, she will not thereafter be able to litigate her case fully in court, with a jury determination of the facts and a judicial determination of the law, respondent's repeated intimations to the contrary notwithstanding. The exhaustion and preclusion issues are, in other words, of a piece in the arbitration area, as the Fourth Circuit understood.

(ii) Respondent's related argument that the *Alexander v. Gardner-Davis* rule has application only after arbitration has occurred, not before, is trebly flawed.

First, *Alexander* holds, as an integral part of its ultimate conclusion that the plaintiff was not precluded from proceeding in court, that a collective bargaining agreement cannot work *any* prospective waiver of an employee's rights to full judicial relief for individual employment discrimination claims. Pet. 10-11, *quoting* 415 U.S. at 51. Only *after* so concluding did the *Alexander* Court go on to consider whether "[t]he actual submission of petitioner's grievance to arbitration . . . alter[s] the situation" (415 U.S. at 52), deciding that there could be no preclusion simply because the employee used the grievance/arbitration machinery once the dispute arose.

Second, soon after *Alexander*, this Court held in *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976), relying on *Alexander*, that Title VII's timely-filing requirement should not be tolled while an employee pursues grievance/arbitration procedures under a collective bargaining agreement. That ruling necessarily rests on an understanding that the employee need not pursue

those procedures at all, but instead can proceed directly to court.

Finally, *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), expressly rejected the contention that employees covered by a collective bargaining agreement, even a collective agreement that permits arbitration of statutory issues, need resort to the collective agreement's grievance/arbitration procedures in the first instance. Pet. at 12 n.4. *Barrentine* took note of the facts (1) that the agreement in question would have permitted arbitration of the stautory issue involved in that case (the Fair Labor Standards Act issue) (450 U.S. at 731 n.5), and (2) that four of the plaintiffs had not pursued their contractual remedies, but emphasized that "our holding *does not depend on whether petitioners formally filed grievances*," (450 U.S. at 731 n.6 (emphasis added)).

(iii) Indeed, if respondents were right that the Fourth Circuit simply understood *Alexander* as a case limited to the preclusion context, there would be all the more reason to grant *certiorari* here. As *Varner* indicates, other courts of appeals have not so understood *Alexander*, but instead have regarded that case as equally applicable to the questions of whether collective bargaining agreement arbitration should be required in the first instance and whether a collective bargaining agreement arbitration, once completed, should be preclusive of plenary federal court litigation. *Varner, supra; Waters v. Wisconsin Steel Works*, 502 F.2d 1309, 1316 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976); *Gibson v. Local 40, Supercargoes & Checkers*, 543 F.2d 1259, 1266 (9th Cir. 1976); *Romero v. Union Pac. R.R.*, 615 F.2d 1303, 1310 (10th Cir. 1980). Thus, if the Fourth Circuit indeed held, as respondent maintains, that *Alexander* has no application to the exhaustion question and never had, then the decision below is in conflict on that ground with the decisions of the Seventh, Eighth, Ninth, and Tenth Circuits.

3. Owen-Brockway's final argument against granting *certiorari* is that Ms. Austin's failure to file a written EEOC charge deprives this Court of jurisdiction over the question that the Fourth Circuit did decide. Br. Opp. 18. There is no reason, however, why this Court could not—or should not—decide the arbitration question and, if it reverses the Fourth Circuit on that question, remand for further proceedings, including proceedings to decide the charge-filing issue.

As the district court held (Pet. App. 30a-31a), there is a conflict in the evidence concerning Ms. Austin's attempts to file a charge with the EEOC. Ms. Austin's evidentiary submissions showed that she and her attorney both were told by the EEOC, on the telephone, that the agency would not accept her charges or send her a form for filing a charge; the employer submitted evidence disputing Ms. Austin's declaration and that of her attorney. *See also* Br. Opp. 19. The district court concluded that because "[t]here is a significant dispute as to precisely what actions Plaintiff took in bringing her complaint to the attention of the EEOC . . . summary judgment disposition on the issue of plaintiff's noncompliance . . . is inappropriate." Pet. App. 31a.

The Fourth Circuit, in turn, declined to decide, as respondent asked it to do, whether the failure to file a written charge with the EEOC is jurisdictional even if Ms. Austin's contention that she tried but was unable to file such a charge is accepted:

> Since a valid agreement to arbitrate future disputes effectively ousts a court of jurisdiction . . . each of the two defenses asserted here is essentially a plea to the jurisdiction. We need only decide one of them and decide the failure to submit the claim to the grievance-arbitration procedure. . . . We express no opinion on the [charge-filing] question. [Pet. App. 2a n.1.]

The Fourth Circuit was surely correct in its conclusion that, where two *jurisdiction-related* issues are raised, a court necessarily has jurisdiction to decide *either one* of those questions first. This Court could therefore, if review were granted, proceed in the same manner and, if it disagrees with the Fourth Circuit on the arbitration issue, reverse on that ground and permit the Fourth Circuit to reach and decide the second jurisdictional issue. Any other course would insulate the Fourth Circuit's decision from review because of an undecided jurisdictional question while leaving the opinion fully operative as a precedent for all future cases arising in the Fourth Circuit.[1]

CONCLUSION

For the reasons stated above and in the Petition for Writ of Certiorari, the petition should be granted.

Respectfully submitted,

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[1] We note additionally, if more be necessary, that none of the cases respondent cites on the charge-filing question holds that an individual who *does* make an attempt to file a written EEOC charge but is precluded by the agency from doing so has not sufficiently met her charge-filing requirement for jurisdictional purposes. Thus, respondent's charge-filing objection is more properly regarded as procedural, not jurisdictional, and, like any other potentially dispositive question left undecided by a court of appeals, as an undecided question that does not preclude plenary review of the question that was decided.